

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**APPEAL FROM THE MICHIGAN COURT OF APPEALS
Honorable Donofrio, P.J., and Saad and Meter, J.J.**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

JOSEPH WILLIAM MILLER

Defendant-Appellee.

Supreme Court No. 149502

Court of Appeals No. 314375

Leelanau Cir. Ct. No. 12-1777-FH

**BRIEF OF THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN
AS *AMICUS CURIAE* IN SUPPORT OF
DEFENDANT-APPELLEE JOSEPH MILLER**

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STATEMENT OF QUESTION PRESENTED

SINCE THE UNITED STATES SUPREME COURT HAS REPEATEDLY RECOGNIZED THAT THE “SAME OFFENSE” TEST FOR A CRIME WHICH MAY BE COMMITTED ALTERNATIVE WAYS TURNS ON THE PARTICULAR WAY THE DEFENDANT IS CHARGED WITH COMMITTING THE CRIME, SHOULD *REAM’S* HOLDING TO THE CONTRARY BE OVERRULED?

Amicus says “Yes”.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Criminal Defense Attorneys of Michigan (“CDAM”) is a professional organization open to all lawyers providing criminal defense in the state of Michigan. CDAM organizes and educates its member attorneys in order to promote expertise in the area of criminal law, constitutional law, and procedure; to improve trial and appellate advocacy; and to improve the quality of legal representation for persons in the criminal justice system.

CDAM and its members have a strong interest in the correct application of the Double Jeopardy Clause of the Fifth Amendment in Michigan courts so that criminal defense attorneys may accurately advise their clients as to whether those clients potentially face multiple punishments for offenses that would be considered to be “the same offense” by the United States Supreme Court. Therefore, CDAM asks this Court to overrule *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008), as *Ream* is inconsistent with several decisions of the United States Supreme Court.

ARGUMENT

- I. SINCE THE UNITED STATES SUPREME COURT HAS REPEATEDLY RECOGNIZED THAT THE “SAME OFFENSE” TEST FOR A CRIME WHICH MAY BE COMMITTED ALTERNATIVE WAYS TURNS ON THE PARTICULAR WAY THE DEFENDANT IS CHARGED WITH COMMITTING THE CRIME, *REAM’S* HOLDING TO THE CONTRARY SHOULD BE OVERRULED.

Introduction

In this case, the Michigan Court of Appeals held that Mr. Miller could not be subjected to multiple punishments for violating MCL 257.625(1) (operating while intoxicated (OUIL)) and MCL 257.625(5) (OUIL causing serious injury). To reach that conclusion, the Court of Appeals held that: (1) the two crimes were the “same offense” within the meaning of *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), when, as here, the defendant was convicted of an aggravated offense (OUIL causing serious injury) with the other offense (OUIL) as the charged predicate; and (2) there was no clear legislative intent to provide for multiple punishment for these two offenses.

This brief addresses the first point. In its order granting leave to appeal, this Court recognized that the Court of Appeals’ decision was in tension with *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008), which held that felony murder and the predicate felony are not the “same offense” because one *can* commit felony murder many different ways without committing the particular predicate felony Mr. Ream committed. In Mr. Miller’s case, the same logic would seem to apply: the aggravated crime of OUIL causing serious injury *can* be committed without committing the particular predicate offense Mr. Miller committed.

But *amicus* respectfully contends that *Ream* is incorrect as a matter of federal constitutional law. The United States Supreme Court has repeatedly held, directly contrary to *Ream*, that felony murder and the predicate felony are the “same offense” within the meaning of the Double Jeopardy Clause, and that, more generally, an aggravated version of a crime which can be committed with

multiple predicate offenses is the “same offense” as the particular predicate offense used to charge the defendant with the aggravated offense. *Ream* overlooked some of these cases and erroneously concluded that others had been implicitly overruled or fatally undermined by *United States v Dixon*, 509 US 688; 113 S Ct 2849; 125 L Ed 2d 556 (1993). To the contrary, all of those cases remain good law today. Indeed, the result in *Dixon* itself would make no sense if this Court’s decision in *Ream* were correct.

Amicus therefore respectfully requests that this Court overrule its decision in *Ream*.

a. The United States Supreme Court has repeatedly and looked to the particular theory by which a defendant was charged to determine whether the defendant was twice convicted for the “same offense.”

The question before the Court in *Ream* was whether felony murder and the predicate felony are the “same offense” within the meaning of the Double Jeopardy Clause. If the two crimes are the “same offense,” it follows that a Michigan defendant may not be punished for both felony murder and the predicate felony because Michigan’s constitutional protection against double jeopardy bars successive prosecutions and multiple punishments for the “same offense.”¹

As *Ream* recognized, the United States Supreme Court had repeatedly answered the exact same question before. 481 Mich at 236 (citing *Harris v Oklahoma*, 433 US 682; 97 S Ct 2912; 53 L Ed 2d 1054 (1977), and *Whalen v United States*, 445 US 684; 100 S Ct 1432; 63 L Ed 2d 715 (1980)). In *Harris*, the defendant was convicted of felony murder based on a predicate felony of robbery with

¹ If two crimes are the “same offense,” they cannot be the subject of successive prosecutions if the first prosecution resulted in a conviction or acquittal. *Ream*, 481 Mich at 227. But two crimes that are the “same offense” can be tried at the same time and result in multiple punishments as a matter of federal constitutional law if, and only if, there is clear legislative intent to permit such multiple punishments. *See Missouri v Hunter*, 459 US 359, 368; 103 S Ct 673; 74 L Ed 2d 535 (1983). This Court has recognized, however, that the Michigan Constitution’s double jeopardy provision, Const 1963, art 1, § 15, treats the term, “same offense” identically for purposes of both successive prosecutions and multiple prosecutions. *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007). “Therefore, multiple punishments are authorized if ‘each statute requires proof of an additional fact which the other does not.’” *Ream*, 481 Mich at 228 (quoting *Smith*, 478 Mich at 307).

firearms, and he was then brought to trial for robbery with firearms. 433 US at 682. The Court unanimously held that the second prosecution was barred by the Double Jeopardy Clause because a “person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence.” *Id.* at 683 (quoting *In re Nielsen*, 131 US 176, 188; 9 S Ct 672; 33 L Ed 2d 118 (1889)).

Three years later, the Court held in *Whalen* that a District of Columbia defendant could not be subjected to multiple punishments for rape and felony murder with rape as the predicate, absent clear Congressional intent to authorize such multiple punishments. Most relevant for present purposes, the Court squarely rejected the prosecution’s *Blockburger* argument that the two offenses were not the “same” because the aggravated offense could be committed in multiple ways not involving rape:

The Government contends that felony murder and rape are not the “same” offense under *Blockburger*, since the former offense does not in all cases require proof of rape; that is, D.C. Code § 22-2401 (1973) proscribes the killing of another person in the course of committing rape *or* robbery *or* kidnapping *or* arson, etc. Where the offense to be proved does not include proof of a rape—for example, where the offense is a killing in the perpetration of a robbery—the offense is of course different from the offense of rape, and the Government is correct in believing that cumulative punishments for the felony murder and for a rape would be permitted under *Blockburger*. **In the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense. There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, had separately proscribed the six different species of felony murder under six statutory provisions.**

Whalen, 445 US at 694 (Emphasis added and in original).

Four years later, the Court once again summarily and unanimously reversed, with a citation to *Harris*, an armed robbery conviction which had followed a prior prosecution for “capital murder

committed during the perpetration of the robbery while armed with a deadly weapon.” *Payne v Virginia*, 468 US 1062; 104 S Ct 3573; 82 L Ed 2d 801 (1984) (*per curiam*).

Outside of the felony murder context, the Court reached the same conclusion in *Illinois v Vitale*, 447 US 410; 100 S Ct 2260; 65 L Ed 2d 228 (1980). In *Vitale*, the defendant was charged with both “manslaughter by automobile” and “careless failure to reduce speed.” The Court concluded that the two charges would not amount to the same offense if the prosecution chose to prove that Mr. Vitale was reckless for doing something other than failing to reduce his speed. But if the prosecution did rely on Mr. Vitale’s failure to slow, then *Harris* would apply:

If, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the “same” under *Blockburger* and Vitale’s trial on the latter charge would constitute double jeopardy under [*Brown v Ohio*, 432 US 161; 97 S Ct 2221; 53 L Ed 2d 187 (1977)]. In any event, it may be that to sustain its manslaughter case the state may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in [*Harris*].

In *Harris*, we held, without dissent, that a defendant’s conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. **The Oklahoma felony-murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony-murder prosecution. But for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements.** Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense. The State conceded that the robbery for which petitioner had been indicted was in fact the underlying felony, all elements of which had been proved in the murder prosecution. We held the subsequent robbery prosecution barred under the Double Jeopardy Clause, since under *In re Nielsen*, 131 U.S. 176 (1889), a person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense—an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. . .

By analogy, **if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of**

double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution.

Vitale, 447 US at 420-421 (Emphasis added; footnote omitted).

In sum, the United States Supreme Court has clearly and unambiguously held at least four times that a predicate offense and an aggravated offense are the “same offense” for Double Jeopardy Clause purposes if the prosecution used the particular predicate offense to prove the aggravated offense, even if the predicate offense is not necessarily included in the aggravated offense (that is, if the aggravated offense can be satisfied with proof of other predicate offenses). Each of these holdings is contrary to this Court’s decision in *Ream*.

- b. Since the United States Supreme Court has not overruled, or even cast doubt on, its multiple precedents holding that a crime may be the “same offense” as another crime for double jeopardy purposes even if the first offense may be committed in ways other than the defendant committed it, *Ream* is incorrect and should be overruled.**

In *Ream*, this Court held that felony murder, with first-degree criminal sexual conduct as the predicate offense, was not the same offense as first-degree criminal sexual conduct “because first-degree felony murder can be committed without also committing first-degree criminal sexual conduct.” 481 Mich at 241. This Court reasoned that since felony murder can be committed with “any of the felonies specifically enumerated” in the felony murder statute, the fact that Mr. Ream was specifically charged for a felony murder with first-degree criminal sexual conduct as the predicate made no difference. *Id.* (Emphasis in original).

The reasoning and holding of *Ream* is obviously directly contrary to the reasoning and holdings of *Harris*, *Whalen*, *Vitale*, and *Payne*. Because the question of whether two offenses are the same under the *Blockburger* test is a question of federal law, this Court’s holding in *Ream* was erroneous unless the United States Supreme Court had overruled all four of those cases.

This Court’s decision in *Ream* never mentions *Vitale* and *Payne*, but the decision does conclude that *United States v Dixon*, 509 US 688; 113 S Ct 2849; 125 L Ed 2d 556 (1993), undermined

Harris and *Whalen* by overruling the “same conduct” test that had been adopted in *Grady v Corbin*, 495 US 508; 110 S Ct 2084; 109 L Ed 2d 548 (1990). *Ream*, 481 Mich at 236-237. *Amicus* must respectfully point out that this Court’s analysis in *Ream* was wrong for at least five reasons.

First, *Dixon*’s overruling of *Grady v Corbin* had nothing to do with *Harris* or *Whalen*. *Harris* and *Whalen* (and *Vitale* and *Payne*, for that matter) were all decided well before the Court adopted the “same conduct” test in *Grady*. *Harris* and *Whalen* were not predicated on the “same conduct” test, nor could they have been predicated on that test since they were decided long before the Court adopted that test.

Instead, *Harris* and *Whalen* were plainly predicated on the *Blockburger* test. In the excerpt from *Whalen* quoted above (445 US at 694), the Court explicitly considered the prosecution’s argument that Mr. Whalen’s multiple punishments for felony murder and the predicate felony did not run afoul of *Blockburger*, and the Court explicitly rejected that argument. While *Harris* did not actually cite *Blockburger*, *Vitale*, in the excerpt quoted above (447 US at 420-421), explains unambiguously that *Harris* is an application of *Blockburger*.

If there were any doubt on this score, Justice Scalia, who wrote the opinion for the Court in *Dixon* overruling *Grady*, dispels any notion that *Harris* was somehow being overruled. In a plurality portion of his opinion, Justice Scalia explained how the result in *Dixon* was dictated by *Harris* (and *Vitale* and *Whalen* as well):

In this situation, in which the contempt sanction is imposed for violating the order through commission of the incorporated drug offense, the later attempt to prosecute Dixon for the drug offense resembles the situation that produced our judgment of double jeopardy in *Harris v Oklahoma*, 433 US 682 (1977) (*per curiam*). There we held that a subsequent prosecution for robbery with a firearm was barred by the Double Jeopardy Clause, because the defendant had already been tried for felony murder based on the same underlying felony. We have described our terse *per curiam* in *Harris* as standing for the proposition that, for double jeopardy purposes, “the crime generally described as felony murder” is not “a separate offense distinct from its various elements.” *Illinois v Vitale*, 447 US 410, 420–421 (1980). Accord, *Whalen v United States*, 445 US 684, 694 (1980). So too here, the “crime” of

violating a condition of release cannot be abstracted from the “element” of the violated condition. The *Dixon* court order incorporated the entire governing criminal code in the same manner as the *Harris* felony-murder statute incorporated the several enumerated felonies. Here, as in *Harris*, the underlying substantive criminal offense is “a species of lesser-included offense.” *Vitale, supra*, 447 US, at 420. Accord, *Whalen, supra*.

Dixon, 509 US at 698 (Scalia, J, plurality opinion) (Footnote omitted).

In a later part of his opinion in *Dixon*, where he was now writing for the Court, Justice Scalia made it perfectly clear that *Harris* had nothing to do with the *Grady v Corbin* “same conduct” test and was instead nothing but an application of the *Blockburger* test:

Harris never uses the word “conduct,” and its entire discussion focuses on the *elements* of the two offenses. See, e.g., 433 US, at 682–683 (to prove felony murder, “it was necessary for all the ingredients of the underlying felony” to be proved). Far from validating Justice SOUTER’s extraordinarily implausible reading of *Nielsen*, *Harris* plainly rejects that reading, treating the earlier case as having focused (like *Blockburger*) upon the elements of the offense. Immediately after stating that conviction for felony murder, a “greater crime,” “cannot be had without conviction of the lesser crime,” the *Harris* Court quotes *Nielsen*’s statement that “a person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents.” 433 US, at 682–683, quoting from 131 US, at 188. It is clear from that context that *Harris* regarded “incidents included” to mean “offenses included”—a reference to defined crimes rather than to conduct.

Dixon, 509 US at 706-707 (Footnote omitted). In short, *Dixon* not only failed to overrule *Harris*; it expressly reaffirmed it.

Second, *Vitale*, which this Court apparently overlooked in *Ream*, also demonstrates that *Ream*’s reasoning and holding are mistaken. As in the instant case, Mr. Vitale was charged with both a motor vehicle offense (careless failure to reduce speed) and an aggravated offense (manslaughter by automobile) reflecting the harm caused. The Court squarely recognized that the fact that Mr. Vitale could be convicted of the aggravating offense without necessarily proving the particular predicate did not remove the Double Jeopardy Clause bar to convicting him of both the predicate and the aggravated offense using that particular predicate.

Third, *Harris*, *Vitale*, and *Whalen* were plainly not overruled by *Dixon* as the United States Supreme Court and members of the Court have continued to cite them **after** *Dixon*. *Ream* was correctly decided if and only if it was correct in its conclusion that *Dixon* effectively overruled *Harris* and *Whalen*, and if *Vitale* and *Payne* are also no longer good law. But the United States Supreme Court and the members of that court have continued to cite all of these cases since *Dixon* without the slightest indication that any of these cases are no longer good law.

In *Rutledge v United States*, 517 US 292, 297; 116 S Ct 1241; 134 L Ed 2d 419 (1996), for example, the Court cited *Whalen* for the proposition that multiple punishments are not permitted for the same offense absent legislative intent to the contrary, with no indication whatsoever that *Whalen* had been overruled three years earlier in *Dixon*. That same year, Justice Stevens cited and discussed both *Vitale* and *Harris* in an opinion concurring in part and dissenting in part in *United States v Ursery*, 518 US 267, 318; 116 S Ct 2135; 135 L Ed 2d 549 (1996) (Stevens, J). Once again, there was not the slightest suggestion in Justice Stevens' opinion that either *Vitale* or *Harris* had been undermined, much less overruled.

Finally, Justice Scalia, the author of the *Dixon* opinion overruling *Grady v Corbin*, cited and discussed *Harris* five years later as standing for the proposition “**that a person tried for felony murder cannot subsequently be prosecuted for the armed robbery that constituted the charged felony.**” *Lewis v United States*, 523 US 155, 177; 118 S Ct 1135; 140 L Ed 2d 271 (1998) (Scalia, J, concurring; emphasis added). If *Dixon* had somehow overruled (or even undermined) *Harris*, it would be passing strange indeed that the author of *Dixon* continued to cite *Harris* as good law for exactly the proposition on which it was supposedly overruled.

Fourth, it is simply impossible to reconcile the result in *Dixon* with the holding in *Ream*. According to *Ream*, *Dixon* overruled (or undermined) *Harris* and *Whalen* so that there is no Double Jeopardy Clause violation in convicting a defendant of both a compound crime based on a predicate

crime and the predicate crime so long as the compound crime can be committed with a different predicate crime. But in *Dixon*, **six members of the Court concluded that it violated the Double Jeopardy Clause to do exactly that.** The judgment of the Court, announced by Justice Scalia, concluded that Mr. Dixon's successive prosecution for cocaine possession was barred because he had been previously convicted of contempt for violating the criminal code by committing that same cocaine offense while on bond, and Mr. Foster's subsequent simple assault conviction was barred because he had previously been held in contempt for violating a protection order by committing that particular assault. 509 US at 712.

It is true that there was no majority opinion in *Dixon* explaining exactly why it violated *Blockburger* to prosecute Mr. Dixon and Mr. Foster for offenses for which they had already been held in contempt, when they could have been held in contempt for committing any number of different predicate offenses. But it also true that it is impossible to reach that result under this Court's decision in *Ream*.

More to the point, there is absolutely no indication in *Dixon* that a majority of the Court was prepared to overrule all four of *Harris*, *Whalen*, *Vitale*, and *Payne*. The only opinion that even disparages any of those precedents was Chief Justice Rehnquist's partial concurrence and partial dissent. 509 US at 714 (Rehnquist, CJ, concurring in part and dissenting in part). And even that opinion would not have overruled *Harris* but would have merely "limit[ed] *Harris* to the context in which it arose: where the crimes in question are analogous to greater and lesser offenses." *Id.*

Fifth, until the United States Supreme Court explicitly overrules its own constitutional precedents, other courts are bound to follow those precedents. Even if this Court had been correct in *Ream* to conclude that *Harris* and *Whalen* (and *Vitale* and *Payne*) had been undermined by subsequent precedent, this Court would still have been bound to follow them until the United States Supreme Court had explicitly overruled them. *See, e.g., Agostini v Felton*, 521 US 203, 237; 117 S Ct

1997; 138 L Ed 2d 391 (1997) (“We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that ‘[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.’”) (Citation omitted).

In short, *Harris*, *Whalen*, *Vitale*, and *Payne* remained good law after *Dixon*, and they remain good law today. Therefore, this Court erred in *Ream* in reaching a result that was contrary to the reasoning and holdings of those four cases.

CONCLUSION

Therefore, *amicus curiae* respectfully requests that this Court overrule *People v Ream*.

Respectfully Submitted,

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